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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 533

MENE GRANDE OIL COMPANY,

Petitioner,

—against—

MOBIL TANKERS COMPANY S.A. and
SOCONY MOBIL OIL COMPANY, INC.,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI

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Inaccuracies in respondents' memorandum compel a reply.

Respondents' Question Presented No. 1 (brief p. 1) is not true to the record. The court below did not merely *fail* "to categorically state that the decision of the District Court was 'clearly erroneous' ", as respondents say. On the contrary, it categorically asserted that the "clearly erroneous" rule "is inapplicable in the instant case" (Appendix to Petition, p. 19).

Respondents' Question Presented No. 2 (brief p. 1) is deceptively incomplete. The suit was brought by a foreign corporation which the District Court correctly described as an "expatriate" and the American corporation did not even try to get into the act until after the District Court had granted the motion to dismiss. The District Court quite

accurately described this as tail wagging dog (Petition, pp. 4-5).

Respondents make no attempt to dispute petitioner's second Reason for Granting the Writ, viz., that the public interest requires that Appellate judicial authority confine itself, or be required to confine itself, within the proper boundary of its Appellate function. This the Court below failed to do in that the District Court had granted the motion to dismiss on the basis of sound judicial discretion, yet the Court below refused even to consider whether or not that discretion had been abused. That is the only proper criterion.

It is not true as respondents assert (brief p. 4) that in *United States* v. *United States Gypsum Co.*, 333 U. S. 364 (1947) the law on the point presently in question "has been definitely settled by this Court." *Gypsum* does not even touch the question presented now. *Gypsum* holds that findings of fact may be reversed when "clearly erroneous" but that proposition is not disputed. The question presently presented is whether or not FRCP Rule 52(a), which says that findings of fact shall not be set aside unless clearly erroneous, applies where the findings are derived from affidavits and oral argument of counsel who make affidavits. This Court has never spoken on that question.

Nor is it true as respondents suggest (pp. 4-7) that there is no real conflict on this point among the circuits. Each of the seven cases, from six circuits, cited at page 7 of the petition holds that FRCP Rule 52(a) does apply where findings are based on affidavits and *every one of them was decided since Gypsum.*

Burt v. *Isthmus Development Co.*, 5 Cir., 218 F. 2d 353, cert. denied 349 U. S. 922, does not hold what respondents say it does and their quotation from it is deceptively incomplete (brief pp. 7-9). After respondents' first quotation from *Burt* (brief p. 8) the Court continued:

> "Nevertheless, because we are of the belief that it is unnecessary to do so here, we are not prepared flatly to hold that no discretion exists in *any* such case to decline jurisdiction. Experience has taught that such a holding may prove unsound in extreme cases; and the Supreme Court in the Swift case, supra, declined to pass upon a similar point. We leave that question open" (p. 357).

Neither *Burt* nor any other case is authority for the proposition respondents assert.

It is not true, as respondents say (brief p. 3), that the Court below filed its opinion "reversing the District Court on the ground that Socony and Meneg are not 'foreigners' but United States citizens." The Court below said, on this point, only that the District Court "seemingly treated the suit as one between foreigners in apparent disregard of the status of Socony and Meneg as citizens of the United States * * * " (Petition, p. 20). But the court below was quite mistaken in so saying. The District Court made correct findings as to the citizenship of all parties, and as to the principal sphere of their activities as related to the issues in this case (Respondents' Appendix below, pp. 126-7a) but looked "to the realities", as urged by this Court in *Koster* v. *Lumbermens Mutual Co.*, 330 U. S. 518, 527-8, and found that

"* * * unless we close our eyes to the fact that Mobil Tankers, although controlled by United States interests, is in fact a foreign corporation, whose foreign flag ships officered and manned by all foreign crews, are in world trade only incidentally touching at United States ports, and that Mene Grande is only nominally a United States citizen, can any analogy be found between the cited cases and this situation" (Respondents' Appendix below, p. 133a).

In its Supplemental Opinion, after Socony's belated intervention, the District Court said:

"However, I do not regard Socony's presence as a party as altering the substance of the question originally presented by Mene Grande's motion to dismiss for lack of venue. It is not Socony's presence as a party but its interest in the oil cargo which is the important consideration. This interest was as real then as now and was considered at the time. The crux of the matter, as I view it, is the way Socony chose to assert its interest in this cargo. It did not file an independent suit as it might have. It was content to let Mobil sue as bailee. And even in the face of Mene Grande's motion to dismiss, Socony took no action to join as a party or otherwise intervene in order to assert its position independently. Now that the change of venue has been ordered, it belatedly appears, seeks to join as a party and asks to be heard, all of which is singularly unpersuasive. The implication is strong that the real reason for joining as a party is to face this Court with an American plaintiff seeking to recover on a cause of action arising abroad in which event, in a

proper situation, the rule of *The Saudades* and the *M/V Kokei Maru* might well be applicable. But I do not think that rule should apply under these circumstances" (Respondents' Appendix below, pp. 138-9a).

"To Socony's argument that, as an American plaintiff having a real interest in the controversy, it prefers to litigate its case before an American court, I can only say that its right in this connection is no higher than that of its subsidiary; that the subsidiary must try its case in Venezuela where, in my judgment, it will receive a fair trial; and that the slight additional inconvenience to Socony in having to join as a party to the Venezuelan suit, if, in fact, it even has to, does not alter the basic equities of the case. To permit this relatively small claim to be a decisive factor in these considerations would amount to letting the tail wag the dog" (*id.* p. 139a).

"There is an additional contention that this Court has emphasized Mobil's foreign residence while slurring over Mene Grande's Delaware residence. In its petition for reargument, Mobil says, 'A corporate defendant resides primarily in the jurisdiction in which it is incorporated; and for that reason, suit was commenced against respondent in the District of Delaware.' Accepting libelant's contention and applying it literally to these facts, then, we have a foreign corporation, Mobil, neither domiciled in, a resident of, the United States, instituting suit against Mene Grande, a United States resident, but not domiciled here, based on a cause of action which arose thousands of miles away and where the United States resident *does not* want to litigate the action in this country because of the strong incon-

venience to it in so doing. In such a case, the only existing authority *Linea De Vapores* v. *The President Polk* (see main opinion) seems to support the application of the *forum non conveniens* doctrine" (*id.* p. 140a).

"At the risk of repetition, I will say that, in essence, this is a suit between two foreign corporations doing substantially all their business abroad, concerning a cause of action which happened 2000 miles away where literally, not a single witness as to the negligence charged, except experts, lives in the United States, and where, if tried in this country, the law of a foreign country would control."

"This has not been an easy question. The facts refuse to allow themselves to be neatly pigeonholed. There is no case on all fours. Of course, if one wishes to view the case superficially as simply a quarrel between two American corporations because they are both American owned, authority could be found for trying the case here. Even so, the hardship on Mene Grande would not change. But if one attempts to analyze the facts of their residence and domicile against the background of their sphere of business operations and in the light, not only of existing law, but of hardship to the respondent, the situation is presented for the exercise of discretion on the part of this Court to decline jurisdiction" (*id.* pp. 140-1a).

When American capital sets up, and engages in, business abroad we submit that it is in the best interests of the United States as concerns its relationships with friendly foreign sovereigns as well as the efficient and expeditious

administration of justice that such business be admonished, to paraphrase Cervantes, "When thou art at Venezuela, do as they do at Venezuela."

Respectfully submitted,

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Dated: New York, N. Y.
October 3, 1966